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Dear Sir

### **YOUR ENQUIRY INTO S 35P OF THE ASIO ACT**

We welcome the opportunity to make a submission in relation to the enquiry into s 35P of the *Australian Security Intelligence Organisation Act 1979* (the ASIO Act). In making the submissions below, we have considered the importance of an effective national security programme in Australia, and the need for the Australian Security Intelligence Organisation (ASIO) to conduct covert operations with protections in place for participants. In this context, we are writing to express our deep concerns for the potentially far-reaching implications of s 35P.

Ad hoc explanations by the Attorney-General have so far created uncertainty in relation to the interpretation and scope of the provision, whereas on a reading of the section, its meaning seems entirely clear, and in our submission, untenable. It is our contention that the provision in its current form is too broad in scope, and potentially criminalises lawful communications by bona fide journalists, lawyers, academics and even members of the public, who may share this information. Considering the significant criminal penalties which a breach of the provision attracts, its meaning should be clear and unambiguous to avoid confusion, without the need for additional explanations.

### **SCOPE AND IMPACT OF S 35P**

Section 35P(1) provides that:

*A person commits an offence if: (a) the person discloses information; and (b) the information relates to a special intelligence operation.*

The penalty for breach is imprisonment for 5 years and recklessness is the fault element for the circumstance described in paragraph (1)(b)—see s 5.6 of the *Criminal Code*.

Section 4.4(4) of the *Criminal Code* provides that “If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element.”

The inclusion of proof of “knowledge” as satisfaction of the fault element is of particular concern, as discussed below.

The effect of s 35P is that it creates a blanket provision prohibiting the disclosure of information relating to a special intelligence operation (SIO). This prohibition covers information relating to illegal activities carried out by participants in covert operations. Sections 35A and 35K sanction the carrying out of activities by participants in SIOs which would otherwise be illegal, and indemnify them from civil and criminal liability. There are certain exceptions contained in s 35P(3) and notably, academic researchers, journalists and lawyers are not included in the list of exceptions.

### ***Academic researchers***

As academic researchers, we are concerned about the adverse effect s 35P may have on academics researching and writing in the areas of international law and policy, human rights law and policy, constitutional law and media and communications law and policy, and more specifically on matters relating to the ASIO Act and national security. Whilst the Attorney-General’s office has stated in its communications that “it is highly unlikely that an academic or researcher seeking to contribute to public debate on security and intelligence matters would, in the ordinary course of their work, possess such awareness [that the information related... to a special intelligence operation]”, (correspondence with National Tertiary Education Union, 16 March 2015), this does not exclude the possibility that an academic researching in this area could possess such knowledge and thus be caught by this provision. As recklessness is the applicable fault provision under s 35P and proof of “knowledge” is sufficient to satisfy the fault element, academics will be severely constrained in their ability to research and write in these areas with impunity. If the provision was not intended to apply to these research activities, they should be expressly excluded.

This is particularly relevant given s 35P does not contain a sunset clause allowing for the eventual dissemination of information related to SIOs. There are other secrecy provisions in the ASIO Act which allow for eventual disclosure of information and s 35P ought to follow suit. Section 34ZS, for example, prohibits the disclosure of issued warrants until two years past the warrant end date.

### ***Journalists***

The Fourth Estate should be able to report on matters of public interest. Pursuant to s 35P, journalists are severely impaired in their ability to investigate and report on information that may be at risk of referring to an SIO. We agree with the following observation made by the Law Council of Australia:

*...in practical terms, it may mean that journalists may be disinclined to report on potentially criminal or corrupt conduct arising out of “ordinary” operations by ASIO out of trepidation that they were aware of a risk that the information may relate to an SIO. (Law Council of Australia, Submission, 20 April 2015).*

Thus, even if they may perceive the disclosure to be in the public interest, they are unable to do so, as there is no public interest defence available for breach of the provision. These constraints apply not only to first instance disclosures, but any subsequent communication of the information where there is a risk that it may be related to an SIO, potentially also putting “citizen journalists” and social commentators at risk of breaching s 35P and attracting criminal liability.

There should be a public interest defence available to journalists who, in good faith, disclose information relating to an SIO in the public interest. This would accord with the approach to treason offences under s 80.3(f) of the *Criminal Code Act 1995* (Cth), which allows for a good faith defence where commentary is published in good faith about a matter of public interest.

In the absence of a Bill of Rights, the Australian Government should guard against introducing legislation that will adversely impact on the freedom of political communication. Unlike the USA, where the First Amendment of its Constitution guarantees freedom of speech, or the UK, where the *Human Rights Act 1998* protects freedom of expression, there is no statutory protection of free expression in Australia. As stated above, the proposed s 35P makes significant inroads into the ability of journalists to report on any matters that may or may not relate to an SIO, if there is even a remote possibility that this is the case.

### **JUSTIFICATION FOR S 35P**

Pursuant to the revised explanatory memorandum, s 35P has been enacted as a deterrent to the disclosure of highly sensitive material. There are a number of secrecy provisions within the ASIO Act which may act as a deterrent and achieve the purpose of the provision, which is essentially to protect participants in SIOs. For example, s 92, deals with the disclosure of identities of participants in ASIO activities and ss 18A and 18B with the disclosure of information of ASIO activities by ASIO employees or affiliates.

More specifically, s 92 provides that it is an offence to disclose and identify an employee of ASIO or an ASIO affiliate. This includes previous employees; however, should written consent from the Minister, Director General or the previous employees themselves be obtained, no breach will have occurred. The word 'Identify' includes identification by inference or implication. The penalty for breaching s 92 has recently been increased to ten years.

Sections 18A and 18B, enacted at the same time as s 35P, are also designed to deter ASIO employees or affiliates from disclosing any information generated within the scope of ASIO's performance and functions without prior authorisation from the Director-General. The attached penalties are three years' imprisonment. Section 18A pertains to the unauthorised dealing with records. Should a person be an employee, affiliate or contractor, who obtains a record in that capacity and then subsequently deals with that record outside the direct scope of their relationship to ASIO and without authorisation, they will have committed a criminal offence. Section 18B, in the alternative to s18A, pertains to the unauthorised recording of information or matter, rather than dealing with records. Any information generated or acquired by ASIO may not be recorded unless authorisation to do so has been granted. This includes making notes from a conversation had or overheard.

Significantly, both provisions specify that no offence will have been committed once the information has already been lawfully disclosed to the public. It would appear that ss18A and 18B address any disclosure of sensitive information, including that relating to SIOs. Section 92 captures the publication or cause for publication of the identification of any ASIO employees. All three provisions have criminal liabilities attached. Given that the premise of s18A, s 18B and s 92 is to prevent the disclosure of information generated in and for ASIO, including employee details, there is arguably no

justification for the existence of s 35P, which imposes an unreasonable burden on recipients once the information has been released.

### **SCOPE OF COMMONWEALTH'S LEGISLATIVE POWER IS NOT UNLIMITED**

Legislation enacted by the Commonwealth Parliament must be supported by a source or 'head' of legislative power as set out in the *Australian Constitution*. If s 35P is subject to constitutional challenge, the Commonwealth may seek to rely on s 51(vi) of the *Australian Constitution* as the source of legislative for enacting s 35P. Section 51(vi) is referred to as the 'defence' power. The defence power is a 'purposive' power. This means that s 51(vi) cannot justify any law, instead, the means must be reasonably appropriate to the purpose (see, for example, *Australian Communist Party v Commonwealth* (1951) 83 CLR). Section 35P(1) creates an offence for conduct that merely 'relates' to an SIO, but may have no negative effect on defence or on any intelligence operation, and in so doing, exceeds what is reasonably appropriate to the purpose of defending the nation by protecting and enhancing SIOs. In so doing, the legislation exceeds the scope of the defence power.

### **PRESERVING THE IMPLIED FREEDOM OF POLITICAL COMMUNICATION**

The *Australian Constitution*, by way of ss 7 and 24, grants an implied freedom of political communication. This freedom can be understood as follows:

Inherent in the Constitution's doctrine of representative government is an implication of the freedom of the people of the Commonwealth to communicate information, opinions and ideas about all aspects of the government of the Commonwealth to communicate information, opinions, and ideas about all aspects of the government of the Commonwealth, including the qualifications, conduct and performance of those entrusted ... with the exercise of any part of legislative, executive or judicial powers of government which are ultimately derived from the people themselves (see *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 74).

A breach of this implied freedom of political communication occurs when there is a) a burden on communication about government or political matters, and b) that burden is disproportionate and not otherwise justified by a legitimate public interest (see, for example, *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520).

Section 35P has the direct legal effect of burdening political communication in that it restricts 'the people of the Commonwealth to communicate information, opinions and ideas about all aspects of the government of the Commonwealth to communicate information, opinions, and ideas about all aspects of the government'. While there may be a legitimate public interest in enhancing the efficacy of intelligence and security operations, the legislative means adopted in s 35P(1), in particular, exceed that public interest by creating a blanket offence, which applies even where no harm is caused to any person or operation. The intelligence operation need not be compromised in any for an offence to occur. Instead, the disclosure must simply relate to an SIO. In this way, s 35P is disproportionate. Therefore, s 35P is constitutionally invalid because it breaches the implied freedom of political communication in the *Australian Constitution*.

## INTERNATIONAL LAW

Australia agreed to be bound by the *International Covenant on Civil and Political Rights* (ICCPR) on 13 August 1980. Further, the ICCPR is expressly identified in section 3(1)(c) of the *Human Rights (Parliamentary Scrutiny) Act* (Cth) 2011. Section 35P, however, contravenes Article 19 of the ICCPR. Specifically, art 19 (2) provides that:

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media.

While art 19(3) does permit the freedom of expression to be, 'subject to certain restrictions ... for the protection of national security or of public order', such restrictions are only to be 'such as are provided by law and are necessary'. The *Parliamentary Joint Committee on Intelligence and Security*, 2014 has argued that the disclosure offences in s 35P 'are necessary, given the significant and adverse consequences which arise from the compromise of covert intelligence operations'. The problem is, however, that in criminalising a disclosure that merely 'relates' to a special intelligence operation, rather than actually harming a special intelligence operation, s 35P, exceeds what is necessary for national security. In so doing, s 35P breaches international law.

## EXTRATERRITORIAL SCOPE

Section 15.4 of the *Criminal Code* (extended geographical jurisdiction--category D) applies to an offence against sub-s (1) or (2) of 35P. Category D offences are an example of universal jurisdiction, which means this offence can be enforced against any national for conduct occurring anywhere in the world. Under international law, assertions of extraterritorial jurisdiction are generally reserved for serious international crimes, such as war crimes and piracy. The description of Category D offences in the Criminal Code reads as follows:

If a law of the Commonwealth provides that this section applies to a particular offence, the offence applies:

(a) whether or not the conduct constituting the alleged offence occurs in Australia; and

(b) whether or not a result of the conduct constituting the alleged offence occurs in Australia.

Therefore, s 35P quite considerably extends the range of extraterritorial conduct that could be subject to Australian law. This undermines the rule of law. It is not reasonable or possible that academics, journalist and lawyers in all parts of the world will know of the existence and scope of s 35P. Further, there appears to be no defence available to 2(c)(ii) and the meaning of, 'prejudice the effective conduct' is not defined in the provision. This means 2(c)(ii) might well be satisfied by the most minor of inconveniences or administrative burdens. Notably, any assertion of any of these categories of 'extended geographical jurisdiction' require the consent of the Attorney-General if the conduct in question takes place wholly outside Australia and the accused is not an Australian citizen. Therefore, assertions of extraterritorial criminal jurisdiction by Australia over non-nationals become a question of political discretion. This undermines legal certainty. Section 35P has the potential to

include a wide range of conduct that may be far removed from any malicious intent against Australia or Australians.

## CONCLUSION

Section 35P(1), in extending to the disclosure of information that merely 'relates' to an SIO, exceeds what is reasonably appropriate to the purpose of defending Australian citizens by protecting and enhancing special intelligence operations. In so doing, the legislation exceeds the scope of the defence power conferred on it by s 51(vi) of the *Australian Constitution*, and should be repealed.

In addition, when the effect of s 35P is weighed up against the freedom of an independent press, and the ability of Australian subjects to enjoy the limited implied freedom of political communication conferred upon them by the courts, the provision imposes a burden on communication about government or political matters which is disproportionate and contrary to the public interest. Consequently s 35P is constitutionally invalid because it breaches the implied freedom of political communication in the *Australian Constitution*. Furthermore, s 35P significantly extends the range of extraterritorial conduct that could be subject to Australian law. It is unreasonable to subject academics, journalist and lawyers worldwide to the operation – and possible infringement - of s 35P, considering the considerable penalties attached to a breach of the provision.

There is no public interest defence available to journalists who, in good faith, disclose information relating to an SIO in the public interest, which conflicts with the approach to treason offences under s 80.3(f) of the *Criminal Code Act 1995* (Cth).

We contend that the disclosure protections afforded by s 18A, s 18B and s 92 address ASIO objectives of protecting participants in SIOs sufficiently, obviating the need for s 35P which imposes an unreasonable burden on recipients once information has been released.

In view of the concerns expressed in this submission, we regard the proposed SIO regime and offences imposed by s 35 P as detrimental to the democratic freedom of academic researchers and journalists, and of Australian citizens in general, and advocate for the repeal of s 35P in its current form.

*This submission was written by Dr Francina Cantatore, Dr Danielle Ireland-Piper and Niamh O'Dowd, on behalf of the Faculty of Law, Bond University.*

Yours sincerely

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